

No. 1313

In the Supreme Court

OF THE

United States.

October Term, 1904.

D. E. WHEELER and D. W. RIDENOUR,
Partners, doing business under the firm name and style of WHEELER & RIDENOUR,

Petitioners,

vs.

THE COUNTY OF PLUMAS,

Respondent.

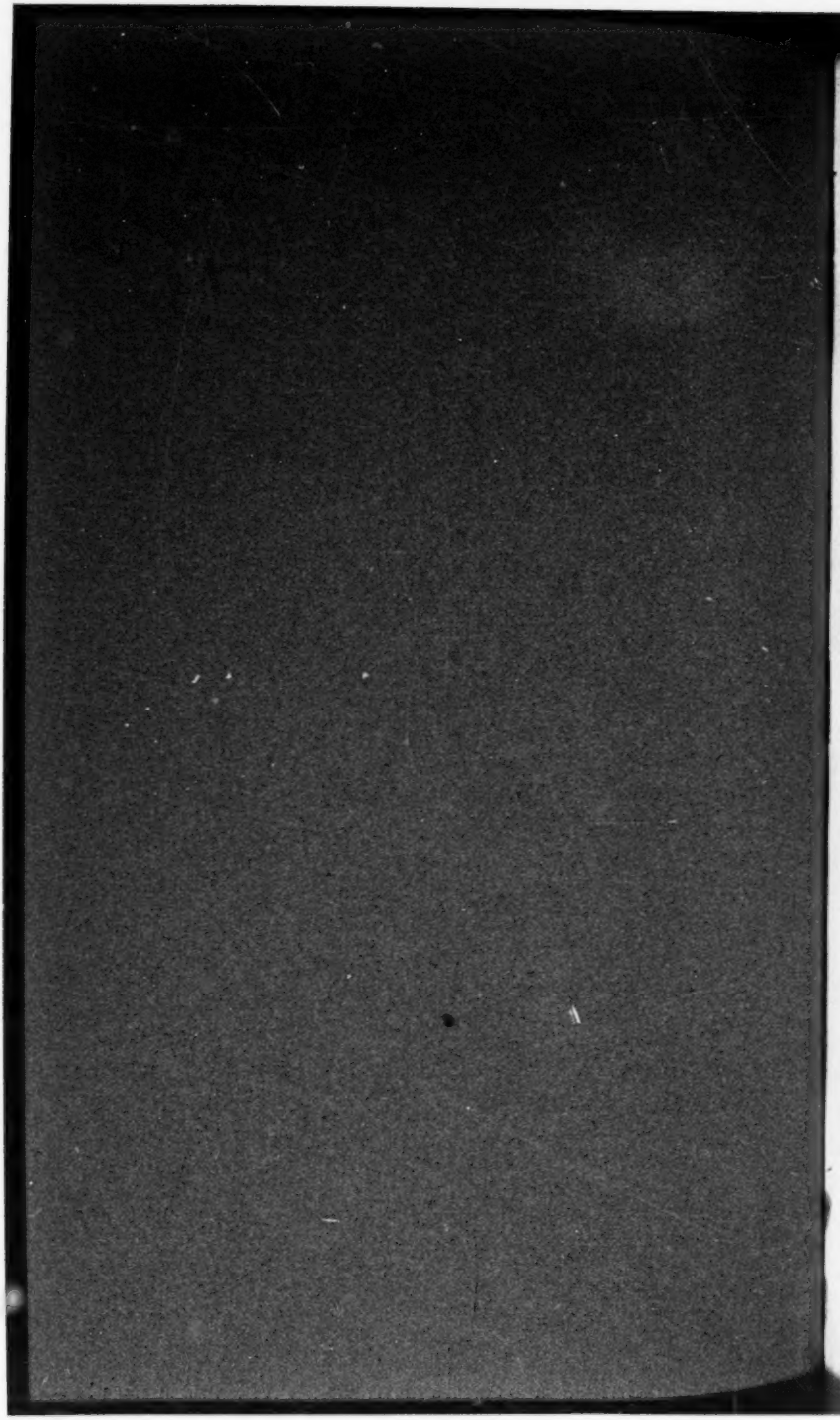
BRIEF FOR RESPONDENT,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

U. S. Webb,
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Of Counsel.

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On pages 2, 3 and 4 of the brief filed herein by petitioners are copied portions of the ordinance alleged by petitioners to be invalid, but a better understanding of the ordinance may be had by a reading of it in its entirety, and it is found printed in full on pages 2, 3 and 4 of the transcript of record.

The ordinance involved in this case was duly passed by the Board of Supervisors of the respondent county on the 9th day of January, 1900, and the authority and power to pass the same at such time is not questioned.

Petitioners contend:

1. That the ordinance under which this action was commenced was repealed by the act of the legislature of the State of California of March 23, 1901, and hence the action is abated, and argue:

(a). That the ordinance is "by its very terms" a revenue measure and hence repealed, and

(b). That the right upon which respondent founded its action is penal in its nature and hence the repeal destroyed the remedy, and that the cause of action became as though it had never been.

2. That the ordinance is in conflict with the Constitution of the State of California, (1) it imposes double taxation; (2) it is not uniform in its operation, and, (3) it levies a tax without a prior assessment. And argue

(a). That the license is a tax on the animals and not on the business.

(b). That the sheep within the county have already been assessed and taxed for the purpose of revenue and that the ordinance imposes an additional tax for the same purpose.

(c). That all the sheep in the county are not taxed, and

(d). That the same tax is placed on all kinds of sheep and on lambs as well as sheep.

Respondent contends:

1. That the ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed;

2. That when petitioners commenced to do business in the county they became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no repeal could affect it;

3. That all constitutional questions raised have been decided adversely to petitioners by the Supreme Court of the State of California.

The ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed.

It is conceded that the power of the Board of Supervisors of the county to license for purpose of revenue was repealed by the Act of the Legislature of the State of California of March 23, 1901 (Cal. Stat. 1900, Chap. CCIX, p. 635, hereinafter cited as Section 3366, Pol. Code); but even so, it does not necessarily follow that the ordinance in question here was repealed. If, as petitioners contend, the ordinance *by its very terms* is a revenue measure, then, certainly the ordinance was repealed; but, if the ordinance is a regulatory measure, the contrary would follow as a matter of course. At the time of the passage of the ordinance the laws of California contained two grants of power to the legislative body of the county authorizing its enactment, one found in the Constitution and one in the General Laws.

The Constitutional provision is as follows:

"Any county * * * may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

California Const., Art. XI, Sec. 11.

The County Government Act provided:

"That the Board of Supervisors in their respective counties shall have jurisdiction and power under such limitations and restrictions as are prescribed by law to license for purposes of regulation and revenue all and every kind of business not prohibited by law, and transacted and carried on in such county * * * to fix the rates of license tax upon the same and to provide for the collection of the same by suit or otherwise."

County Government Act, Sec. 25, Sub. 25, Stat. 1897, p. 465.

"Of the power of the State to authorize the license of all classes of trades and employments, there is no doubt * * * But a legislative grant of power to a municipal corporation to license business, etc., within its corporate limits, does not necessarily include a power to impose license for revenue purposes.

"The distinction between the two powers is well recognized. Imposing licenses for regulating business, etc., is an exercise of the police power, while imposing them for revenue purposes is an exercise of the taxing power." (Citing 2 Dillon Mun. Corp., Sec. 768.) "It may therefore be questionable whether before the Constitution of 1897 the city had under its Charter power to impose licenses for purposes of revenue; but under the provisions of the Constitution which we have quoted (Secs. 11 and 12, Article XI.) there is no doubt of the power of municipali-

ties to impose licenses for the purposes of regulation, or revenue or both regulation and revenue."

In re Guerrero, 69 Cal. 90.

"We do not deem it necessary to discuss the question as to whether the license in question is imposed for revenue purposes or for the purposes of regulation, for the reason that the Board possessed authority to impose it for either, or both." (Citing Ex parte Mount, 66 Cal. 448.)

Ex parte Mirande, 73 Cal. 374;

See also

County of El Dorado v. Meiss, 100 Cal. 270;

County of Inyo v. Erro, 119 Cal. 120.

In ex parte Mount the ordinance in question provided that every person or firm or corporation who at any fixed place of business sold any goods, wares or merchandise, whether on commission or otherwise (except such as were sold by auctioneers under license) should obtain from the License Collector a license, and pay therefor the amount of money to be determined and regulated by the amount of sales made or business transacted. The ordinance then proceeded to graduate the amount of license required to be paid in proportion and according to the amount of sales or business transacted by the person or firm, and the Court say as follows:

"It is claimed that Section 4 of the Act simply provides that the City Council shall have power to make regulations for licensing, taxing and regulating all such vehicles, business and employments as the public good may require, but that it contains no express grant of power either to issue or grant or to

require a license to collect any money or tax therefor, but we are of the opinion that the power of regulating or to make regulations was sufficient, and that it carries with it and includes the power to pass an ordinance requiring a license to be taken out, as was done by the ordinance in question. * * * It seems to us very clear that the power exercised by the Common Council and complained of in this case was vested in that authority by the Act of 1862 amendatory of the City Charter, and that the delegation of such power by the legislature was constitutional is equally clear. It comes within what is known as the police power for regulation, and is properly vested in the municipality."

In that case respondent made the point that the ordinance was authorized by Sections 11 and 12 of Art. XI of the Constitution of 1879, in reference to which the Court say:

"But we think the second ground relied on by respondent in support of the ordinance is equally strong and unanswerable."

"By section 2 (II), Art. XI of the constitution it is provided: 'That any city, town or township may make and enforce within its limits all such local, sanitary, and other regulations as are not in conflict with general laws'. Here the delegation of power by the organic law is very broad and comprehensive, and we have had occasion in several cases to construe the foregoing section of the constitution. (Court cites Ex parte Walters, 65 Cal. 269; Ex parte Moynier, 65 Cal. 33)."

Thornton, Judge, concurring says:

"It is unnecessary to decide whether the power with which the City Council is by the Act of 1862 invested springs from the police power or the power to tax and raise revenue. The power is given and

can be amply given under either source of authority. (Const. Art. XI Secs. 11 and 12.)"

Ex parte Mount, 66 Cal. 448.

"The ordinance is authorized by the Legislature, and is a part of the local police regulation of the city and relates to matters within the city. Our attention has not been called to any general statute which, in terms, or by application, prohibits the imposition of a license tax as a police regulation."

Ex parte Ah Toy, 57 Cal. 92.

"All doubts are to be resolved in favor of its validity, and likewise all proper presumptions are to be invoked to that end. For these reasons alone the Court feels justified in construing the words 'license tax' as synonymous with 'license fee or charges'; for the words 'license tax' do not necessarily and always means a 'license tax' assessed and collected for purposes of revenue."

Ex parte Pfirrman, 134 Cal. 147.

"The power to make these regulations is by this section (Sec. 11, Art. XI of the Constitution) conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the law-making power which the people through their Constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the Constitution than if it had been conferred immediately through an Act of the Legislature."

Ex parte Roach, 104 Cal. 276.

In addressing itself to the power of the Board of Supervisors of a county to license, the Supreme Court of California in a late case say:

> "But aside from the County Government Act, ample and full power is given to the Board of Supervisors by Art. XI of the Constitution 'any County, City, Town or Township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws'."
>
> County of Los Angeles v. Eikenberry, 131 Cal. 461.

From the above authorities it is apparent that the county was authorized by Section 11 of Article XI of the Constitution to pass an ordinance as an exercise of its police power and for purposes of regulation licensing the business of raising, grazing, herding and pasturing sheep unless the ordinance in some way conflicted with general laws. If the ordinance can be construed to be passed for purposes of regulation it would not conflict with any general law to which attention has been called. It is only by construing the ordinance to have been passed for purposes of revenue and not for regulation that it can be claimed to be in conflict with a general law (Sec. 3366, Pol. Code, Cal.) and hence without the protection of the Constitution. This brings up the question is the ordinance "by its very terms" a revenue measure? If it is not, it is plain that much of the force of petitioners' argument on the point is lost. The ordinance on its face does not express whether it was passed for the purposes of revenue or for regulation, and whether it was for one purpose or the other depends

upon whether or not, on any reasonable theory, the legislative body which passed it had the power to exact a license fee of ten cents a head on the business of raising, grazing, herding and pasturing sheep for the purpose of recompensing the county for the necessary expense of issuing the license, the expense attending direct regulation and oversight, and the incidental cost to which the county is subjected in providing for and maintaining a proper system of supervision. The only office of the ordinance is to fix the fee, provide for its collection, and for the issuance of the license, and whether the demand of the fee by the county evidenced the exercise of the police power of its legislative body or its intention to tax for purpose of raising revenue would depend upon the purpose for which the ordinance was passed; the form of the ordinance would not control unless, probably, its purpose was expressed upon its face, but in the absence of such expression the form might be the same in both instances (Cooley on Taxation, p. 586) and in determining what fee is reasonable, the legislative body may take into consideration the cost of issuing the license, collecting the fee, regulating and supervising of the business, and whatever extra cost the county may be put to on account of this particular business being transacted in the county.

> " Moreover in fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much

more important, and, indeed, are what are principally had in view when the fee is decided upon."

Cooley on Taxation, p. 599.

See also,

1 Tiedman on State and Federal Control of Persons and Property, p. 483.

The ordinary expenses of government are raised by the usual State, county and municipal tax levy, and estimates can be made that will approximate the ordinary cost of government; but not so in the matter of police regulation as applied to licensed business; that will depend upon many things which cannot be foreseen.

The cost of regulating the business of raising, etc., sheep, will depend largely upon the number of persons who engage in it. If none engage in the business, no cost will accrue, but if a large number engage in the business a large cost is the inevitable result; but who can foresee the number who may visit the county for the purpose of engaging in this business?

The incidental consequences, damage to roads and trails consequent on large bands of sheep crossing and recrossing; fires started by careless sheepherders, etc., are likewise uncertain in the same proportion.

"The plain purpose of the charter provision quoted is to authorize the council to control and regulate the business by means of the license and the fee the general purpose being to promote order, to protect buyers from imposition, etc., and not to suppress the business, or raise revenue. The fact, however, that the city derives a revenue incidentally from the reasonable exercise of the police power in regulating

and controlling the business is no serious objection to such an ordinance."

City of St. Paul v. Coulter, 12 Minn. 16.

This Court in a late case has considered the matter, and say:

"In Wiggins Ferry Co. v. E. St. Louis, 107 U. S. 376 (27 L. Ed.), where a ferry company authorized by an act of Assembly of the State of Illinois to carry on its business and paying State taxes prescribed in its charter, was called upon by a city ordinance to pay a license tax, it was held by this Court that the exaction of a license fee is an ordinary exercise of police power by municipal corporations; that the power of the State to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are quasi public, cannot be disputed, and that whether a license fee is exacted under the power to regulate or the power to tax is a matter of indifference if the power to do either exists."

Postal Telegraph Cable Co. v. Charleston City Council, 153 U. S. 691 (38 L. Ed. 871).

By an ordinance passed in 1894 the Borough of New Hope, Pennsylvania, imposed an annual license fee of $1.00 per pole and $2.50 per mile of wire on the telegraph, telephone and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto, and had afterwards maintained and operated, a line of telegraph poles and wires through the borough, but had refused to pay the license fee. Action was brought to recover the license fees for four years commencing with 1895. Evidence was given in the case as to the local business handled over these wires

by the company, its own cost of inspection, repairs and maintenance, and also testimony tending to show that the borough did nothing in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies. The point was made that the fee was unreasonable for the purposes of regulation.

Mr. Chief Justice Fuller delivered the opinion of the Court, which is in part as follows:

> "It is conceded that the borough had the right, in the exercise of its police power, to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as prima facie reasonable. ***
>
> "While in the exercise of its control over its streets it is admitted that the borough may supervise the location of the poles erected to sustain the wires of the plaintiff in error, may require them to be marked, may make inspection of them as may be necessary to protect the public welfare, and may impose a reasonable license fee for the cost of such regulation and supervision and of the issuing of such permits as may be required for the enforcement thereof, yet it is contended that if the license fee turned out to be in excess of the amount necessary to reimburse the municipality the ordinance became unreasonable and invalid. * * * In Taylor v. Postal Teleg. Cable Co., 202 Pa. 583, 52 Atl. 128, the Supreme Court said: 'Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may

lawfully give to the erection and maintenance of the poles and wires.' "

Western Union Telegraph Company v. New Hope, 187 U. S. 419 (23 Sup. Ct. Rep. 204).

In a similar case in which Mr. Justice Brewer delivered the opinion of the Court, this Court say as follows:

" When it (the license tax) is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible; and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably but the risk may rightfully be cast upon the license, and the charge cannot be avoided, because it subsequently appears that it was somewhat in excess of the actual expense of the supervision.

"The expenses attending direct regulations and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a Court but we think that the rule laid down in Cooley, Const. Lim. (Ed. 1886), p. 244, may be safely adopted: '*A municipal corporation may impose, under the police power, such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of*

officers and other expenses thereby incurred'." (Italics ours.)

Atlantic and Pacific Telegraph Company v. Philadelphia, 23 Sup. Ct. Rep. p. 817.

In another Federal Court presided over by a Justice of this Court, it is said:

"It must be regarded as settled that it is lawful for a state to impose taxes upon property owned and used within it by a corporation of another state, even when such corporation is engaged in interstate commerce, and that the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations. Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961; License Tax Cases, 5 Wall. 462; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 Sup. Ct. 257; Postal Tel. Cable Co. v. City of Charleston, 153 U. S. 692, 14 Sup. Ct. 1094. But these propositions are not disputed by the plaintiff in error. It is, in fact, conceded that the charges in question were imposed under the police power, and are valid if they are reasonable in their amount and in their mode of collection. The claim is that such charges, to be reasonable, must be limited to such amount as is necessary to reimburse the municipality for the expenses to which it is subjected in the enforcement of such inspection rules and regulations as it may lawfully enact, and that in the present case the amount of the charges imposed by the ordinances is excessive, and so far above the reasonable expenses of the city that the ordinances are void. Whether the ordinances are reasonable can be judicially inquired into. When it is said in some of the cases that such a question is for the determination of the Court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations

is that Courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. It has sometimes been urged that such questions are peculiarly suited for legislative determination. And it must be admitted that there is a presumption in favor of the validity of the action of the legislative body, and that the evidence to justify a Court in holding otherwise must be clear and convincing. Still it must be regarded as conclusively settled that the legislative authority to impose license fees or charges is not absolute, and must be exercised with due regard to the rights of the corporations to be affected.

"Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulations and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in Cooley, Const. Lim. (Ed. 1886), p. 242. may be safely adopted: 'A municipal corporation may impose under the police power such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby incurred.'

"Not only is there a presumption in favor of the validity of the action of the legislative body, but the facts upon which that action proceeds are so numerous, and so liable to frequent changes, courts should act cautiously in dealing with such a case, and admit evidence of all the facts and circumstances that seem to bear, even somewhat remotely, upon the issue. As was said by the Supreme Court of Pennsylvania, in Allentown v. Telegraph Co., 148 Pa., St. 119, 23 Atl. 1070 the amount of the license charges rests with the

city councils in the first instance, and it is only where such discretion has been manifestly abused that the courts are justified in interfering.

"In this view of the peculiar nature of the case, we think the trial court erred in excluding the evidence offered on behalf of the city, going to show that considerable additional expense, in providing a greater number of fire companies and apparatus, is rendered necessary by the electric wires suspended in the streets. If, indeed, a new condition of affairs has been caused by the erection of wires and poles in the thoroughfares of the city, which makes it proper for the authorities, in order to protect life and property, to increase its police and fire force and equipment, we think such a state of facts might be shown, and was a proper matter for consideration in fixing the amount of the license charges, and in passing upon their reasonableness. So, further, we think there was error in excluding the evidence offered of the expenses to which the city is, from time to time, put in connection with the meeting of its councils for the purpose of regulating the erection of wires and poles."

Philadelphia v. Western Union Tel. Co., 89 Fed. Rep., p. 460. Opinion by Shiras, Circuit Justice.

"Obviously their intention is to regulate. To accomplish this object a license is required. Before it can be issued twenty-five dollars must be paid, not as a tax, as denominated in one of the sections of the ordinance, but a price for the ferry franchise or privilege. They prohibited anyone from exercising the ferry privilege until a license be granted, and require the twenty-five dollars to be paid, and a bond to perform the duties of ferryman with approved security, to be executed before the license can be granted, thereby showing that the twenty-five dollars are exacted as a price of the privilege, and that the license is required as a means of regulating. This being

me, the twenty-five dollars is a license fee, and not a tax."

Chilvers v. People, 11 Mich. 43.

"The only question presented for our consideration is, Is the fee fixed by the ordinance in question reasonable?

"The power to license and regulate, granted by the statute, was conferred solely for police purposes, and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot in all cases be ascertained in advance, and that 'it would be futile to require anything of the kind'. The result is, if the fee required is not plainly unreasonable, the Courts ought not to interfere with the discretion exercised by the council in fixing it, and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it to be reasonable."

(Citing Burlington v. Putnam Insurance Co., 31 Iowa 105-106; Van Hook v. Selma, 70 Ala. 361; Van Ballen v. People, 40 Mich. 258; Laundry License Cases (Or.), 22 Fed. Rep. 701; Johnson v. Philadelphia, 60 Pa. 245; Ex parte Chin Yan, 60 Cal. 78; Ex parte Gregory, 20 Tex. App. 210; State Center v. Barenstein, 66 Iowa 249; Fisher v. Harrisburg, 2 Grant 291; St. Louis v. Weber, 44 Mo. 547; Corrigan v. Gage, 68 Mo. 541; State v. Gas Co., 37 Ohio St. 45; Clason v. Milwaukee, 30 Wis. 316.)

"According to this rule we cannot say and it does not appear that the fee required in this case is unreasonable. The contrary is presumed. Reversed."

City of Fayetteville v. Carter, 52 Arkansas 301.

See, also,

Chilvers v. People, 11 Mich. 43;
Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370;
Ash v. People, 11 Mich. 347;
Littlefield v. State, 42 Nebraska 223;
City of Jacksonville v. Ledwith, 26 Florida 163;
Tomilson v. Indianapolis, 114 Ind. 142;
State Ex. Rel. White v. Redmond, 43 Minn. 250;
Marmet v. State, 45 Ohio 63;
Ferry Company v. East St. Louis, 107 U. S. 365.

Petitioners refused to try the question of the reasonableness of the fee. They declined to answer and make the issue, and in the absence of a trial it must appear from the *face* of the ordinance that the fee is so excessive that the Court can infer as matter of law that the purpose of the ordinance was to raise revenue and not to reimburse the county for the cost of regulation of the business licensed.

Cooley on Taxation, p. 410; 1 Tiedman on State and Federal Control, etc. 483;
Glenn v. Mayor, 5 Hill & J. 424;
Ex parte Mirande, 73 Cal. 374;
In re Guerrero, 69 Cal. 95;
Merced County v. Fleming, 111 Cal. 46-51;

City of Brooklyn v. Breslin, 57 N. Y. 591-6;
County of Los Angeles v. Eickenberry, 131 Cal. 466;
Ex parte Pfirrman, 134 Cal. 143-7;
Price v. People, 193 Ill. 114;
St. Paul v. Coulter, 12 Minn. 41;
Grand Rapids v. Brandy, 105 Mich. 671;
Atkins v. Phillips, 26 Fla. 281;
Western Union Telegraph Co. v. City of Philadelphia, 12 Atlantic Rep. 144;
City of Uttumwa v. Zekind, 95 Iowa 622;
City of Burlington v. Unterkircher, 99 Iowa, 401;
Vansant v. Harlem Stage Co., 59 Md. 335;
Littlefield v. State, 42 Neb. 223;
People v. Russell, 49 Mich. 633.

The Legislature of California has expressly authorized the county to license and fix the rate of license tax.

> "Where the grant is not made for revenue but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation and of inspecting and regulating the business which it covers. If the state intends to give broader authority. it is a reasonable inference that it will do so in unequivocal terms."
>
> Cooley on Taxation, p. 598.

Certainly in the case at bar the State has given the broadest authority possible in so far as it may give the county power to license for purposes of regulation, exercise its police power, and fix the rates of license tax upon the business licensed, and in the most unequivocal terms—

here is found direct authority to fix a rate of license tax upon *all* businesses transacted in the county, and authority is also given to collect it by suit. Surely the legislature contemplated that a sum of money should be exacted from the person transacting the business, something more than the cost of issuing the license.

See

Chilvers v. People, 11 Mich. 49.

The possibilities for expense to the county which can be directly attributed to this business are large, and in view of the law that most of the expenses of criminal prosecutions—the traveling expenses of the district attorney, and all expenses incurred by him in the detection of crime—the expenses incurred in the support of prisoners—fees of jurors—the accounts of the coroner—the fees of magistrates—the support of indigent sick—the contingent expenses of the county—the fees of constables (County Government Act, Sec. 228, Stat. 1897, 575-77), and in Plumas county the mileage of the sheriff and the fees of reporters (same Act, Sec. 205, pp. 564-5, Stat. 1897), are all county charges payable out of the general fund; the cost of the prevention and eradication of diseases among sheep is a county charge (Stat. 1889, p. 216), and that all indirect burdens laid upon the county by virtue of the sheep business being conducted in the county on such scale that one person grazes 25,000 sheep must be paid by the county, what Court can say that ten cents per sheep is excessive, with no other guide than the record in this case, and what the Court may judicially know?

If it could be shown at a trial of this action with the reasonableness of this license fee controverted, that this business is liable to degenerate into a nuisance by the county becoming overcrowded with sheep on account of the closing of pastures to that animal by forest reservations, settlements, etc., in other portions of the state, excellent authority has been cited for exacting a fee sufficient to restrict the number of those who might engage in the business, and as also appears from the following:

Certain defendants were convicted of peddling without a license, contrary to the provisions of a city ordinance entitled "Ordinance No. 19. Peddlers, how licensed", passed by the city council in the assumed exercise of the power granted them by the city charter "to license and regulate all peddlers doing business within the city", in which it was provided for the issuance of licenses and fixed the amount of the fee at $100 for a year, $60 for six months, $15 for a month, and $5 for one day. The point was made in the case that the ordinance was not a legitimate exercise of the police power to regulate peddling, but a mere tax for revenue purposes, as demonstrated by the unreasonable amount of the license fee exacted, and the fact that its provision in no way looked to the regulation or control of the business.

The Court say:

> "The license fee exacted is somewhat large, and the provisions of the ordinance looking to the regulation of the business of peddling are somewhat meager, but the fourth section certainly contains provisions tending to secure the orderly pursuit of the business; *and the mere fact of exacting a license fee is one*

method of restricting it, which is itself a legitimate method of regulating some kinds of business. The latitude that is given to municipal bodies in fixing the amount of license fees, and the duty of Courts not to declare the amount thus fixed unreasonable, except in very plain cases, have been fully considered by us in former cases. (Citing.) If this was a case of one of the ordinary legitimate kinds of business, like that of butcher, baker, auctioneer, or the like, which are not liable to become public nuisances, and consequently no occasion or right existed to restrict the number of persons who shall engage in it, it might be a question whether the fee exacted would not be unreasonable. But the evils liable to grow out of some occupations may be such that their suppression can only be attained to an appreciable degree by the imposition of some restraint upon the pursuit of such callings or kinds of business. In respect to the great majority of occupations, no such evils are likely to follow; and consequently it would not be competent to attempt to restrain the number of those engaged in them by the imposition of a large license fee. All that could be required would be an amount sufficient to pay the cost of issuing the license, and to defray the expense of necessary police supervision. But where the business is of such a nature that its prosecution will do damage to the public, or that it is liable to degenerate into a public nuisance, then it is a legitimate exercise of the police power to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in such business. Tied. Lim. 274 *et seq.* (Second Ed. Vol. I p. 484 *et seq.*) It is upon this principle that very high license fees are exacted from those vending intoxicating liquors. Peddling, although in itself a moral and lawful pursuit, is one of the kinds of business which, if not thus restrained, is very liable to become a great nuisance, especially in cities, as almost every one knows by actual experience; and in view of that fact it was a legitimate exercise of the police power

vested in the City of Duluth to exact a license fee large enough to restrict the number of persons engaged in peddling, even although the sum was larger than enough to pay the cost of license and the expense of any police surveillance which the city might exercise over the business. In view of all the circumstances, we cannot say that the fee exacted is unreasonable."

City of Duluth v. Krupp, 46 Minn. 435.

"It is a matter of common knowledge and experience that a fence will keep out cattle and horses that will not sheep or hogs. It is evident that in passing the statute cited relative to the running at large of hogs and the herding and grazing of sheep within two miles of dwelling houses, the legislature intended to further the public good and preserve the peace by preventing those conflicts which would naturally result from the herding of sheep about the dwellings of settlers. The statutes were intended to promote the public good and avoid danger and injury to the citizen. They were also evidently intended to protect the health of the settlers, and as those questions are of legislative discretion and not judicial, we are not authorized to hold the statutes unconstitutional

"It is contended by the appellant that every citizen has the right to pasture the public domain, and that if the statutes in question are held valid it amounts to taking property without due process of law. There is nothing in this contention. We know of no statute enacted by Congress which grants the citizen the right of pasturage upon the public domain, and counsel for appellant cites no such statute. Citizens graze their stock upon the public domain by sufferance of the general government, and not by virtue of any vested right."

Sifert v. Johnson (Idaho), 65 Pac. Rep. 710.

"In every state the keeping of livestock is under police regulation. The clash of interest between

stock-raising and farming calls for the interference of the state by the institution of police regulations, and whether the regulations shall subordinate the stock-raising interest to that of farming, or vice versa, in the case of an irreconcilable difference, as is the case in respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of livestock, the state or municipal corporation may prohibit altogether the running at large of such animals and compel the owners to keep them within their own enclosures."

2 Tiedman Upon State and Federal Control of Persons and Property, p. 838.

Again, continuing the speculation, it might appear that appurtenant to the mountain homes in many instances in Plumas county are small ditches conveying water for domestic purposes over the public lands of the United States, rights, that had become vested by the appropriation of the waters of rivulets under state law, and in other cases long ditches appurtenant to mining claims, all of which are necessarily subject—the waters to pollution, and the ditches to injury—by large bands of sheep being herded across the ditches and in the watersheds and streams above.

It is no answer to say that the individual damaged has his action at law for damages or in equity for an injunction, for, discarding the propositions that it increases the business of courts, subjects the regular inhabitant of the county, and the public, to annoyance and cost. it causes a clash of interests, exasperates the citizen and leads to possible disorder, attempts to redress the wrong by force, con

sequent disturbance of the peace, and hence increased police expense.

Such a business, while not a public nuisance, *per se*, might under the circumstances above related be conducted so as to come within the definition of such a nuisance, at any rate under such a state of facts it would be so detrimental to the welfare of a community as to justify the legislative body of the county in fixing a larger license fee for its regulation and supervision than in the case of a business where these features are absent.

> "The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."
>
> Lawton v. Steele, 152 U. S. 135-38 Law Ed. 388.

The justification for "High License" in the case of the regulation of the liquor traffic is its being the indirect cause of increased cost to the public and that it is but just that the business which causes the increased cost should bear the burden. Of course it is not claimed here that the business of raising, grazing, herding and pasturing sheep is as harmful in its effect upon the public as the sale of intoxicating liquor by retail but it is claimed that the business largely increases the public expenditures of the county, which expenditures are made necessary solely by reason of this business. It is further claimed that the public lands of the county are the public pastures, the commons so to speak, and that the effect of the herding of large bands of sheep on the public lands is, that the

sheep-herder has sole use of these public pastures, thereby excluding cattle-raisers, settlers, prospectors and pleasure-seekers from that part of the public domain, to the detriment of the county, and the country generally, hence it may be seen that the indirect burdens laid upon respondent by this business are capable of being approximated in a large sum when measured by their value in money.

The case of Lawton v. Steele (152 U. S. 135), holds that it is the duty of the state to protect its fisheries because they are common to all; by force of the same reasoning it is the duty of the state to protect the public pastures, and the county would necessarily have the right to regulate the use of the pastures in such way as to make them most beneficial to the public.

It seems fairly deducible from the above authorities that the Court must presume and hold that the ordinance was passed as an exercise of the police power of the respondent and for purposes of regulation, in the absence of a finding that the fee is unreasonable after a trial of the issues.

Petitioners claim that the ordinance does not license the business of raising, grazing, herding and pasturing sheep, for the reason that it does not first "forbid or make illegal the carrying on of the business mentioned", and then consent that it may be carried on provided that a license is procured.

This is placing a narrow construction on the effect of the ordinance, when read in connection with the general laws of the State of California.

The Penal Code of the State (Sec. 435) provides:

> "Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out, or procuring the license prescribed by such law, is guilty of a misdemeanor."

The County Government Act (Cal. Stat. 1897, p. 465, Chap. CCLXXVII, Sec. 25, Sub. 25) provides that

> "Any person, firm, or corporation transacting, or carrying on such business without such license whenever prescribed is guilty of a misdemeanor",

and the Supreme Court of the State has decided that a county of the State has no power to pass an ordinance punishing precisely the same acts which are punishable under the general laws of the State (see *In re Sic* 73 Cal. 148, Ex-parte Mansfield, 106 Cal. 400, Ex-parte Stephen, 114 Cal. 282), hence it appears, that, when the ordinance and the general law are read together transaction of the business is prohibited unless a license is taken out.

> "If a statute inflicts a penalty for doing an act the penalty implies the prohibition, and the thing is unlawful though there be no prohibitory words in the statute." (1 Kent. Lecture XX, star paging 467.)
>
> "When a statute, with a view of affording protection to the public, imposes a penalty for doing an act it thereby prohibits it and renders it illegal. Thus, a statute which imposes a penalty on a person who exercises, or occupies himself as a surgeon without being licensed, is a prohibition of such practice."
>
> Sutherland on Statutory Construction, Sec. 335.

Therefore it is plain that the moment the license was prescribed by the county the transaction of the business

was forbidden unless the license was taken out. hence the issuance of the license permits the person to transact the business.

The Supreme Court of the State of California has passed upon the point as follows:

> "If, for example, the order provided no punishment whatever for doing business without a license, but merely provided what the license should be, it would be valid, and the statute supplements it by making the failure to comply with the order a crime, and providing the penalty."
>
> Ex-parte Christensen, 85 Cal. 210, 212.

Again it is only a lawful business, and a business transacted and carried on in the county that the county can license—the grant of powers reads:

> "To license * * * all and every kind of business *not* prohibited by law, and transacted and carried on within the limits," etc.
>
> Political Code, Cal. 3366; County Gov. Act, Cal. Sec. 25; Sub. 25 Stat. 1897, p. 465.

The decision in Cache v. Jensen was rendered in a case where there had been a trial on the merits, and much of the opinion is addressed to the facts of that particular case after a finding of facts showing that the raising, grazing, herding and pasturing of sheep in Utah was not detrimental to the public, and that the sheep were grazed in several counties in one season, one of the grounds for holding being that each county through which the sheep were herded might impose a license tax and thus make the tax a burden.

The case is questionable authority here for several reasons: First, the Court expressly declines tc follow the decisions of the Supreme Court of California, as appears from the following:

> " Counsel for respondent states and relies on several California cases where ordinances similar to the one in question herein were held valid. It does not appear, however, from these decisions, that the conditions under which sheep-raising is carried on in California are similar to those under which the business is conducted in this state; nor are the provisions of the California consitution on the subject of taxation the same as those in our constitution. But if, in both states, all these things were similar, we should not be inclined to follow these decisions."

Judge N. Baskin one of the judges, also dissented.

Again it does not appear that in the Utah Constitution, counties have the right to legislate locally on these matters; and further it is submitted that on a careful reading the prevailing opinion is not sound in some particulars. For instance, the ordinance in question is condemned because it does not even contain a hint as to regulation of the business, nor that the business requires any regulation,

> " *nor that the county will afford protection of any kind to the persons engaged in the business, nor that it is of such a character as to require regulation or protection.*" (Italics ours.)

The power to license was for the purposes of regulation, and for this purpose to fix a fee to be paid. Now what regulation is contemplated? Certainly those police regulations as are needful to secure and preserve the public order

and to protect each individual engaged in the business in the enjoyment of his own rights and privileges by requiring the observance of rules and order, fairness and good neighborhood by all around him. (Cooley on Taxation, p. 586.)

However it may be in Utah, in California the guaranty of such protection exists in its constitution and general laws without waiting the passage of the county ordinance to effect it.

In Mayor v. Second Avenue (32 N. Y. 261), the power under which the ordinance was passed did not expressly authorize the city to license nor to levy a license tax, and one of the reasons for the decision was that the city had already granted to the railroad the right to run its cars.

In Merced County v. Helm the Court determined *as matter of law* that the ordinance involved "by its very terms" was a revenue measure (the ordinance exacted $3,000 per quarter from all persons who sold liquor), and even as to the point decided, it has been held to have gone to the extreme verge of strictness. (See Los Angeles v. Eikenberry, 131 Cal. 467.)

From the fact that the ordinance provides that the moneys derived from the license tax "shall be paid over to the county treasury, as other moneys are, and be placed to the credit of the general fund of the county", petitioners conclude that the ordinance "by its very terms" is a fiscal, not a regulatory, measure, but in what way does that provision of the ordinance indicate its purpose? It has been shown that most of the charges coming under the head of police charges are paid out of the gen-

eral fund, so to that extent the money went into the proper fund. It may be admitted that road expenses are paid from the road fund, but the admission does no harm because the board of supervisors have power, under their general powers, to transfer from one fund to another.

> "The board of supervisors * * * shall have jurisdiction and power * * * 18. To establish a salary fund and such other county funds as they may deem necessary for the proper transaction of the business of the county, and to transfer moneys from one fund to another as the public interest may require." (Stat. 1897, p. 463.)

Again the general law commands that all license money must be paid to the treasurer.

> Sec. 3363, Political Code, Cal.

The fund into which the money, by the terms of the ordinance, is to be paid, furnishes no test as to whether the measure is for regulation or revenue, necessarily it cannot, for the reason that if the county has to pay the money out for the purpose of regulating the business licensed, and paying the extra cost made necessary by the transaction of the business in the county, what difference does it make which fund the money is paid into? Wherever put, the county gets the credit for it, and it offsets the expenditure from any other fund.

> "The money, collected by way of a license as a police regulation, may go into the state treasury for general revenue purposes, and need not be devoted specially to the relief of burdens which the prosecution of the trade, or occupation imposed on the state, provided that the character of the occupation is such

that restrictions upon its pursuit looking to its partial suppression, would be constitutional, whatever their character may be."

1 Tiedman State and Fed. Control, etc., 486.

In the case of Cooley v. Board of Wardens (2 Howard U. S. 313), it was held that the fact that an act imposing certain pilotage fees on vessels, appropriated the fees to charity, did not impress upon the act the character of a revenue measure.

In Tomilson v. Indianapolis (144 Ind. 142), the fee from a license on vehicles was applied to the repair of streets.

In City of St. Paul v. Coulter (12 Minn. 41), the money went into the city treasury without invalidating the ordinance.

In Littlefield v. State (42 Neb. 223), it went into the school fund.

Notwithstanding the legislative grant of power to license *all* and *every* kind of business and to fix the rate of license tax upon the same the Supreme Court of California held in Sonora v. Curtin (137 Cal. 583) that the board of trustees of a city cannot in *any way* or *manner* regulate the business or profession of practicing law, hence that as to some business no license ordinance would be valid under a power to license in the exercise of police power, and for purposes of regulation. Assuming this view of the law to be correct, the true test as to whether an ordinance is passed in the exercise of the police power, and for purposes of regulation, or as a fiscal measure,

would be whether or not the business was a subject for regulation at all.

> "When the calling is not dangerous to the public either directly, or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation. But those occupations which require police regulation because of their peculiar character, in order that harm might not come to the public can be subjected to whatever police regulation may be necessary to avert the threatened danger."
>
> (1 Tiedman on State and Federal Control, etc., p. 482.)

So that in view of the California case above cited, and so much relied upon by petitioners, the ordinance does not fulfill the test as a revenue measure, but is regulatory, in character, at least, unless it can be successfully shown that the business is not in any degree harmful to the public, which it is submitted cannot be, to say the least, presumed. Now, following the authorities above cited, before the Court can assume, as matter of law that the ordinance is a revenue measure, guided solely by the amount of the license tax demanded, it must find that the tax is so excessive and unreasonable in amount, that under no reasonable state of facts will the amount claimed be needed to pay the expenditures ordinarily the result of such business being carried on in the county, and it is respectfully submitted that a trial of the action was necessary to determine the probable amount needed, which assertion ends the case unless the ordinance is subject to petitioners' contention that it is unconstitutional on other grounds.

All constitutional questions raised have been decided adversely to petitioners by the Supreme Court of the State of California.

It has been squarely held by the Supreme Court of the State of California that a license fee, or charge is not a tax within the meaning of the constitutional provision that taxes must be uniform.

> Santa Barbara v. Stearns, 51 Cal. 499;
> See, also, State v. Cassidy, 22 Minn. 318;
> Ex-parte Robinson, 12 Mo. 263.

The same argument by which it is claimed by petitioners that the license fee charged is a tax on property, and hence if the sheep used in the business had been assessed in the county could have been taxed there under the general levy, would apply to the licensing of any other business—the liquor business, say; the saloon building, liquors, chairs, tables, etc., of the saloon keeper are assessed and taxed, yet it would hardly be claimed that if he was in addition required to pay a license fee, graduated according to the amount of business done by him, as a condition of doing business, that he could claim that he was doubly taxed, in the unlawful sense, even though the exaction of the fee did produce some revenue, as long as the revenue was needed by the county to pay the costs of the regulation and supervision of his business.

If the butcher, or farmer engaged in the business of raising, grazing, herding or pasturing sheep he must pay the license fee.

The case of Police Jury v. Nougues (11 La. Ann. 739),

can be distinguished from the case at bar. In that case the power conferred upon the police jury which levied the tax was as follows:

> "To levy a tax on real and personal property and slaves, upon sheep, vessels, steamboats, or other watercraft landing there for more than five days, except the ferry, during the term of the privilege, upon all wood-yards, carpenter yards, dry docks, livery stables, bakeries, slaughter-houses, taverns, billiard-tables, and upon all other objects liable to taxation."

The "objects liable to taxation" include "all persons pursuing any occupations, trades or provisions."

At first blush this case appears to be in point against respondent, but the decision can be accounted for by the fact that the constitution of Louisiana requires that a license tax shall be equal and uniform.

State v. Endon, 23 La. Ann. 663;
New Orleans v. Iron S. Co., 23 La. Ann. 449.

Here the tax is upon the business, and the fee is laid at a certain amount on each sheep, so as to graduate the fee according to the amount of business done. This is the purpose of the classification.

Again there is no constitutional provision in California which requires a uniform operation of municipal ordinances.

Hellman v. Shoulters, 114 Cal. 146;
County of Amador v. Kennedy, 70 Cal. 459;
Ex parte Haskell, 112 Cal. 416;
Ex parte Hurl, 49 Cal. 557;
See also State v. French, 41 Pac. Rep. 1078;

St. Louis v. Green, 6 Mo. App. 590;

Home Ins. Co. v. City Council of Augusta, 50 Ga. 530;

Ex parte Robinson, 12 Nev. 263.

The cases upon this proposition are almost unanimous, and when opposed to the rule are so on account of some special reason not found in this case. If the Court desires to pursue the matter further, most of the cases will be found quite fairly digested at sections 8, 9 and 10 of Licenses, Vol. 32, Century Digest, columns 2508 and 2519.

> "Certainly, if a charge of five cents a head as in the seventh class had been imposed upon all sheep, it would have been more in harmony with the principle of uniformity and equality declared in the constitution with reference to taxation."

Cache County v. Jensen, 61 Pac. Rep. 303, 307;

See also Ex parte Sisto Li Protti, 68 Cal. 635.

> "Herding and grazing stock is or may be a business, and it is upon such business that the license is imposed. That the property used in any particular calling is subject to and has paid a property tax *ad valorem* * * * does not interdict the right to impose a license upon the business in which such property is used."

Ex parte Mirande, 73 Cal. 375.

This case disposes of all the constitutional questions raised.

See, also,

County of El Dorado v. Meiss, 100 Cal. 270;

Sacramento v. Crocker, 16 Cal. 122;

Sikes v. Mayor, 55 Miss. 115.

All persons engaged in the business of raising, grazing, herding and pasturing sheep are required to procure a license so that the point as to the arbitrary selection has no force. Under decisions cited by respondent, following and including Pasadena v. Stinson (91 Cal. 238), the selection of a class of persons who raise, graze, herd and pasture sheep would be a proper classification.

When petitioners commenced to do business in the county they became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no appeal could affect it.

It was upon this point that the case was decided by the Circuit Court of Appeals and the point will arise here only in the event that this Court first holds that the ordinance is a revenue and not a regulatory measure. This case involves the same questions as are involved in

Flanigan v. The County of Sierra, No. 124,

and was submitted to and decided by the Circuit Court of Appeals with that case. The opinion, which is alike applicable to the two cases, was rendered in the Flanigan case and is found in

Federal Rept., Vol. 122 p. 24,

while this case is reported in the same volume at page 1022. The opinion clearly and fairly presents the point and is adopted as a part of this brief as follows:

"This action was brought by the county of Sierra in "the State of California to recover of and from the "plaintiff in error herein a license tax of two thousand "five hundred dollars, it being alleged that the said

" plaintiff was engaged in that county in the business of " sheep raising without having first paid the license tax " required by ordinance number 54, passed by the board " of supervisors of Sierra county, May 31, 1900. This " ordinance consists of ten sections, which are set forth " at length in the complaint. The first section reads as " follows: 'Each and every person, copartnership, firm " 'or corporation engaged in the business of raising, " 'grazing, herding or pasturing sheep in the County of " 'Sierra, State of California, must annually procure a " 'license therefor from the license collector, and must " 'pay therefor the sum of ten (10) cents for each sheep " 'or lamb owned by, in the possession of, or under the " ' control of such person, copartnership, firm or corpor- " 'ation, and used in such business in said county.' This "ordinance went into effect June 15, 1900, and ten days " thereafter this action was brought. At the time this " ordinance was enacted, the board of supervisors of " each county of California was authorized, subject to " the restrictions and limitations imposed by the con- " stitution and general laws, to license for the purposes " of regulation and revenue, all and every kind of business " carried on in the county. (Stat. Cal., 1897, 465.) On " March 23, 1901, a new section was added to the Political " Code of the State of California to be known as section " 3366, which repealed the authority of the board of super- " visors to license for revenue. (Stats. Am. Code Cal., " 1900, 1901, 635.)

" The averments in the complaint are sufficient to en- " title the county to recover provided the ordinance re-

" ferred to is constitutional, in all respects valid, and of " full force and effect so far as this case is concerned.

" The defendant in the court below (plaintiff in error) " interposed a demurrer to the complaint on the gen- " eral ground 'that said complaint does not state facts " sufficient to constitute a cause of action'. This " demurrer was overruled 'with leave to defendant to " answer within twenty days'. No answer being filed " the Court directed judgment to be entered in favor of " the plaintiff, as prayed for in the complaint. From " this judgment a writ of error is brought to this Court " to have the alleged errors therein corrected. There " are five assignments of error which counsel for plain- " tiff in error have conveniently grouped under three " propositions, viz.:

" (1) The ordinance in question is an unjust, dis- " criminating, oppressive and unconstitutional exercise " of the power to license for the purposes of revenue.

" (2) By the repeal of the statute authorizing boards " of supervisors to 'license for purpose of regulation and " revenue' and restricting their power to license 'in the " exercise of their police powers and for the purposes of " regulation as herein provided, and not otherwise', " without any saving clause in favor of pending suits or " unpaid license taxes, the legislature of the state de- " stroyed the cause of action which it had authorized the " board of supervisors to create, denied any remedy for " its enforcement and abated this action.

" (3) The ordinance is a revenue, not a regulation " measure. As an ordinance for purpose of regulation,

" it is illegal and void, because it does not regulate, and " the fee charged is so unreasonable that the courts will, " as a matter of law, declare that its real purpose is rev- " enue and not regulation, and therefore void as a pre- " tended exercise of the police power."

In the consideration of the various questions raised in this case, it must be remembered that at the time of the passage of the ordinance herein involved, it was expressly authorized by the "Act to establish a uniform system of county and township governments," approved April 1, 1897. (Stat. 1897, Sec. 25, p. 465.)

The validity of similar ordinances—where several constitutional and other objections were raised—has been frequently sustained by the Supreme Court of California.

In re Guerrero, 69 Cal. 88, 91;
Ex parte Mirande, 73 Cal. 365, 372;
County of El Dorado v. Meiss, 100 Cal. 268;
County of Inyo v. Erro, 119 Cal. 119;
County of Los Angeles v. Eikenberry, 131 Cal. 461, 465, 466.

These decisions are binding upon this Court, and will be followed regardless of the decisions, upon similar questions, in other states. (Williams v. Gaylord, 102 Fed. 372, 374 and authorities there cited; *id.*, 186 case U. S. 157, 167.) It is, however, claimed that the case in hand presents other objections that were not considered or decided in the decisions above referred to.

The statute of 1897, among other things, authorized the board of supervisors to pass ordinances

"to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county * * * to fix rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise."

In 1901 the legislature passed

"An act to add a new section to the Political Code of the State of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities and towns, and to impose a license tax". approved March 23, 1901. (Stat. and Amend. to Codes, 1901, 635.)

Section 3366 reads as follows:

"Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, * * * to fix rates of license tax upon the same and to provide for the collection of the same by suit or otherwise."

The Supreme Court of California has held that section 3366 repeals, by implication, the prior act of 1897, in so far as the same relates to the power to collect a license tax for revenue, thus restricting the licensing power of boards of supervisors, under the act of 1897, to matters of regulation alone.

Ex parte Pfirrman, 134 Cal. 143, 147, 148;
City of Sonora v. Curtin, 70 Pac. 674;
Town of Santa Monica v. Guidinger, 70 Pac. 732.

What effect does this repealing act have upon the present action which was brought under the provisions of the law of 1897, before it was repealed?

Counsel for plaintiffs in error contend, that inasmuch as the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law, and rely upon the rule announced in many authorities, that where the right and remedy is given by statute to bring a civil action for the collection of a license tax, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause.

Spears v. County of Modoc, 101 Cal. 303;
Anderson v. Burns, 122 Cal. 273;
State Hospital v. Flaherty, 134 Cal. 315;
Ball v. Tolman, 135 Cal. 375;
City of Sonora v. Curtin, 70 Pac. 674;
Sutherland Stat. Constr., Secs. 162, 163, 166, and authorities there cited;
Endlich on Int. of Stats., Secs. 478, 480.

This principle has been applied more frequently to penal statutes and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter, and in such cases the proceeding will be arrested at the very point where it is at the

time of the repeal. (Spears v. County of Modoc, supra) because: "The repeal of the law imposing the penalty is of itself a remission." (State v. Railroad Co., 3 How. 534, 552, and authorities there cited.)

The ordinance under discussion was adopted May 31, 1900; it went into effect fifteen days thereafter. This action was commenced June 25, 1900. The amendment to the Code, section 3366, was approved March 23, 1901. The judgment in this case was entered March 7, 1902. Under these circumstances does it necessarily follow that because a saving clause was not inserted, the act of 1901 should be given a retrospective operation? Does this question not depend upon the circumstances and conditions of each particular act, its nature and character? In the present case the transaction between the parties, under the ordinance of 1900 was closed; nothing was left to be done except to collect the license due which was authorized by the law then in force. Upon the facts of this particular case can it be said that it was the intention of the legislature by the passage of the act of 1901 to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?

In The City of Oakland v. Whipple, 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before

judgment; and it was there, as here, contended that the act passed in 1870 repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied.

The Court said:

> "To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force."

In The Town of Belvidere v. Railroad Co., 34 N. J. L. 193, 195, where an act authorizing the levying of a certain tax on the capital stock of the defendant was repealed after an assessment of the tax, but before its collection, it was held that the repeal did not prevent the collection of such tax, its collection being regulated by the general tax law, which had not been repealed. In the course of the opinion the Court said:

> "The general legal rule, as found in Dwar on Stat. 676, is referred to viz., 'That when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed'. But even if we accept this definition as strictly correct in its application to every case, still it is not

perceived how, by force of it, the present tax is to be avoided. The case seems to fall within the exception contained in the rule as just quoted. The assessment of this tax closed and ended the transaction, so far as the act of 1862 was concerned. That act authorized the assessment, and appointed the mode of making it, but it had nothing to do with its collection, which was and is altogether regulated by other acts. When, therefore, this assessment was made, the force of the act of 1862 was, with respect to it, wholly spent and exhausted; the thing authorized to be done was completely done, and the consequence is, that even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute continued in force. * * * As a question of intention. it is certainly very improbable that the legislature in 1866, by the repeal of the act of 1862, intended to annul assessments which had been made under the latter act, and which remained uncollected by reason of litigation, or from any other cause. Such a supposition would be most unreasonable. * * * As the tax now in controversy was assessed during the existence of the act of 1862, and as the proceedings for its collection do not depend on that act, my conclusion is, that the subsequent repeal of that statute cannot, on general principles, invalidate such assessment."

See, also,

Dodge v. National Bank, 109 Fed. 726, 731, and authorities there cited.

The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or personal

property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract.

In Sutherland on Stat. Const., Sec. 164, the author said:

> "When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute."

The same rule is laid down by the Supreme Court of the United States, in Steamship Co. v. Joliffe, 2 Wall. 450, 455, where a pilot licensed under a statute had tendered his services to pilot a vessel out of port, and such services were refused, the Court held that his claim to the half pilotage fees, allowed by the statute in such cases became perfect, and that the subsequent repeal of the statute did not affect the judgment rendered in an action brought to recover his claim. In the course of the opinion the Court said:

> "The transaction * * * between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vesel did not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. * * * In such case the party makes no promise on the subject; but the law, 'consulting the

interests of morality', implies one; and the liability thus arising is said to be a liability upon an implied contract."

In the present case the plaintiffs in error did not directly promise to pay the license tax demanded by the defendant in error, but they herded and grazed their sheep in Plumas County when the law for the imposition and collection of the license tax was in full force and effect. They reaped the full benefit of the law, and then refused to comply with it. Do not these facts virtually bring this case within the rule announced in the Joliffe case?

Similar principles are announced in United States v. Williams, 8 Mont. 85, 90, where the defendant sought to avail himself of the repeal of the regulations by the Secretary of the Interior forbidding the cutting of timber on the public land. In the course of the opinion the Court said:

"The question then arises, What were the rights of the United States in relation to this timber? * * * The timber had been unlawfully cut and converted and the right of the United States to receive compensation for its property completely vested. What effect, then, did the subsequent revocation of these rules and regulations, touching the cutting of such timber, have upon this right? We take it that the modification of the rule is analogous to the repeal of the statute, and that its effect must be determined by the rules of law, governing the repeal of the statute under which the alleged right had arisen, and which was being prosecuted in the courts, but still had not been reduced to a judgment."

After referring to the general rule, the Court said:

> "But there are certain exceptions to this general rule. Where trouble and expense may have been incurred, and suits may have been instituted, the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties who have proceeded on the faith of antecedent legislation, and an effort has been made to arrest these results and certain exceptions have been made to this retroactive legislation. Where, then, a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it."

The Court then states and approves the rule in the case of Steamship Co. v. Joliffe, supra, and adds:

> "While the action in the present case cannot be said to be one of contract, but an action of tort for the wrongful cutting and conversion of the timber of the plaintiff, it is hard to imagine a distinction between the right to recover for trees cut and converted wrongfully, and money due for their delivery under contract. If the right is vested in the one case, it seems to us it is equally as clearly vested in the other. Indeed, the timber, when cut, may be deemed personalty, and the plaintiff might waive the tort, and sue for it in assumpsit as so many cords of wood sold and delivered. It seems to us, then, that the plaintiff's right in this case comes within the exceptions to the general rule already stated, by which the right of action is defeated upon the repeal of the law under which it was brought."

The following additional authorities are cited:

Appeal v. Western Md. R. R. Co., 50 Md. 293;

Eastman v. County of Clackamas, 32 Fed. 31-34.

Petitioners' criticism of the decision brings up the question as to whether there is such a conflict between the case as decided by the Circuit Court of Appeals and the cases of Sonora v. Curtin (137 Cal. 583) and Santa Monica v. Guidinger (137 Cal. 658) as decided by the Supreme Court of the State of California, as would compel this Court under the rule cited by petitioners, and of which there is no question, and no complaint, to follow the decisions of the Supreme Courts of California last cited as being a part of the local law on the point in question.

With due respect to the learned and eminent counsel for petitioners, it is submitted that the conflict between the two Courts does not arise out of a construction of a statute of the state.

It is true that the Supreme Court of the State of California has in the cases cited by petitioners decided that the power to license for revenue has been repealed, but this the Circuit Court of Appeals does not controvert and for this purpose only was it necessary to construe the statute, hence as to the *construction* of the statute there is no conflict between the two courts. The conflict comes as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the Circuit Court of Appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the Supreme Court of California deciding that in its cases the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the prin-

ciples of general law and not upon a positive statute of the state. In such cases courts of the United States are not required to follow the decisions of the state courts.

Hough v. Texas and Pacific R. R. Co., 100 U. S. 226. (25 L. Ed. 618);

Pine Grove Township v. Talcott, 86 U. S. 666. (22 L. Ed. 232);

Venice v. Murdock, 92 U. S. 494. (23 L. Ed. 583);

Clapp v. Otoe County, 104 Fed. 474;

Gilbert v. American Surety Co., 121 Fed. 499-502;

City of Ottumwa v. City Water Supply Co., 119 Fed. 324.

The reason for the rule that when the decision of a question involves the construction of a state statute the decision of its highest court should be followed is stated by this Court in Norton v. Shelby County (118 U. S. 425), but in a case like the present where the Court applies a state statute to a situation not involving the construction of the statute, while the decision of the state court is entitled to the highest consideration, it is only to be followed when consistent with the general law upon the subject.

The decision in Sonora v. Curtin followed in Santa Monica v. Guidinger, is wrong, in so far as it conflicts with the decision of the Circuit Court of Appeals in this case. It does not appear that the authorities upon which the Circuit Court of Appeals relied were before the Court, and the Court seems to narrow the purpose of the action into the recovery of a penalty solely, and not a debt, and

in their application of the case here petitioners would deny that they had received any benefit from the ordinance.

In treating the sum sued for as a penalty the Court was probably affected somewhat by the fact that a ten dollar penalty was added to the demand for a three dollar tax.

The Court says:

> "The defendant does not owe for any license because he refused to take out a license. The recovery is sought for his refusal."

Is this not the reason for every recovery in case of debt?

Petitioners ask, "What benefit did he reap?" "What benefit did the law confer on him?" These questions are answered by the facts that they were protected in their business, and the protection paid for by the county; that their damage to public property was repaired and paid for by the county; that lanes across valleys in the fenced portions of the county were furnished them by which they could conveniently reach pastures, and in numerous ways were they benefitted. Even treating the ordinance, for the sake of argument, as a revenue measure, one of its aims was reimbursement for these expenses.

In effect, the county proposed to petitioners that if they came into the county to raise, graze, herd and pasture their sheep that roads and trails damaged thereby would be repaired for other travelers, and that petitioners would be given full police protection, etc., but demanded in return that petitioners contribute to the treasury of respondent county an amount of money estimated to equal the amount

in which the expenses of the county government had been increased by reason of the transaction by petitioners of their business therein.

After this ordinance had been in effect for more than three months, petitioners commenced, and for about two months and a half prior to the commencement of suit continued, the transaction of their business in the county.

The ordinance provided that the amount of the license tax should be deemed a debt due and payable to the county in advance. The commencement and prosecution by petitioners of their business should be held an acceptance of all the terms and conditions of the ordinance.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

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